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Supreme Court of the United States

October Term, 1938

No. 456

UNIVERSAL INSURANCE COMPANY AND
UNIVERSAL INDEMNITY INSURANCE COMPANY
Appellants

against

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY AND CITY OF NEWARK
Respondents

BRIEF OF APPELLANTS

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TABLE OF CASES CITED

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BRIEF OF APPELLANTS

This is an appeal from a judgment of the New Jersey Court of Errors and Appeals affirming a judgment of the New Jersey Supreme Court which sustained the validity of a personal property tax assessed as of October 1, 1934, for the year 1935, by the City of Newark upon the appellants' capital and paid-in and accumulated surplus.

The official report of the *per curiam* opinion of the Court of Errors and Appeals in the case below appears in 120 N. J. Law 185 (R. p. 57). The official report of the opinion of the New Jersey Supreme Court below appears in 118 N. J. Law 538 (R. p. 45). The official report of the opinion in the companion case of *Newark Fire Insurance Company* v. *State Board of Tax Appeals,* which is incorporated in the opinions below, appears in 118 N. J. Law 525 (see Appendix, p. 26).

Statement of Grounds for Jurisdiction

The statute believed to sustain the jurisdiction of the Court is Chapter 229 of the Laws of 1925, 43 Statutes 937, U. S. Code Annotated, Title 28, Section 344-a which reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The statutes of the State of New Jersey, the validity of which is involved, are Chapters 236 of the Laws of 1918, Sections 202, 301 and 307 (see Appendix, p. 29). These sections were in effect at the time the tax in question was levied but have since been revised and are found in Revised Statutes of the State of New Jersey 1937, Secs. 54:4-1, 54:4-9, 54:4-22 (see Appendix, p. 30).

The date of the judgment sought to be reviewed is May 31, 1938, and the date upon which the application for the appeal was made is August 22, 1938 (R. p. 53).

History of Case Below.

The appellants are New Jersey corporations, with registered offices in Newark, New Jersey (R. p. 27). Both of the corporations had on October 1, 1934, and now have, their principal offices in the City of New York from which their entire business was managed and operated (R. pp. 27-38). Under the New Jersey statutes above cited, the Board of Assessment and Revision of Taxes of the City of Newark, as of October 1, 1934, the taxing date fixed by the statute made an assessment upon the entire capital

stock paid-in and accumulated surplus of each corporation, the effect of which, as found by the Courts below, was to impose a tax upon intangible personal property having its permanent business situs in New York. These assessments reduced in amount were confirmed by the Essex County Board of Taxation (R. pp. 1 and 16).

Appeals were taken by both appellants to the New Jersey State Board of Tax Appeals, where a trial *de novo* was held (R. pp. 3 and 19). The State Board of Tax Appeals filed an opinion dismissing the application (R. p. 9) and judgments were entered confirming the judgments of the Essex County Board of Taxation (R. pp. 11 and 25). In these appeals the question of the jurisdiction of the City of Newark to make the assessment and to levy the tax was raised by the appellants (R. pp. 3 and 19) and was decided adversely to the appellants under the opinion of the same Board, in the case of *Newark Fire Insurance Company* v. *City of Newark* (R. p. 9).

Writs of certiorari were allowed by the New Jersey Supreme Court to review the judgments of the State Board of Tax Appeals (R. pp. 1 and 17), and in that Court the cases were consolidated (R. p. 26). The question of the jurisdiction to tax was the first point raised by the appellants before the Supreme Court (R. p. 42), and was decided adversely to the appellants on the basis of the decision of that court in the case of *Newark Fire Insurance Company* v. *State Board of Tax Appeals,* 118 N. J. Law 525 (Appendix, p. 26). The judgment of the State Board of Tax Appeals was affirmed (R. p. 45).

From the judgment of the Supreme Court (R. p. 44) an appeal was taken to the Court of Errors and Appeals, the highest court of the State of New Jersey. This appeal related to the whole of the judgment of the Supreme Court, the grounds of appeal being that the Supreme Court erred in affirming the judgment of the State Board of Tax Appeals in dismissing the writ of certiorari (R.

p. 49). The Court of Errors and Appeals in a per curiam opinion, affirmed for the reasons set forth in the opinion of the Supreme Court (R. p. 57); and an order of affirmance and judgment were entered on May 31, 1938 (R. p. 58). It is from that judgment that the present appeal is taken.

Federal Question Presented.

The case before the Court presents the following Federal question:

> Can the City of Newark or State of New Jersey, without violating the Fourteenth Amendment, tax intangible personal property of a New Jersey corporation, which property on the taxing date had a permanent business situs in another State?

This question was presented by the appellants before the New Jersey Supreme Court, and was actually decided by that Court. See opinion in that Court below (R. p. 45) incorporating the opinion of the same Court in the companion case of *Newark Fire Insurance Company* v. *State Board of Tax Appeals*, 118 N. J. Law 525 (Appendix, p. 31).

The notice of appeal to the New Jersey Court of Errors and Appeals (R. p. 49) raised every issue decided by the Court below. (*Thompson* v. *East Orange*, 94 N. J. Law 106, *State* v. *Verona*, 93 N. J. Law 389.)

The Court of Errors and Appeals, in a per curiam opinion, affirmed the judgment of the Supreme Court for the reasons expressed in the opinion of the Supreme Court (R. p. 57).

The question of jurisdiction went to the whole case, for the other questions considered by the Supreme Court and by the Court of Errors and Appeals related simply to the amount of the tax, and were relevant only on the assumption that the property assessed was within the taxing power of the City of Newark.

The case, therefore, comes within the rule laid down by this Court in *Lynch* v. *New York, ex rel. Pierson*, 293 U. S. 52, 79 Law, Ed. 191, in that it appears from the record that a Federal question was duly presented for decision to the highest court of the State, that the decision of the Federal question was necessary for the determination of the case, that the question was actually decided, and that the judgment appealed from could not have been given without deciding it.

The question raised by this appeal is substantial. It is one of great importance at the present time as it is a matter of public record that since this case has been docketed personal property assessments have been levied by the city of Jersey City and other cities of the State of New Jersey against hundreds of New Jersey corporations having only registered offices in such cities with substantially all of their assets in the form of intangible personal property outside of the State of New Jersey. The validity of such a tax under the Constitution, the same question which is now before the Court, is squarely raised by all of these assessments.

Statement of the Case

Findings Relating to the Situs of the Property Taxed, and Evidence Supporting Such Findings.

The New Jersey Supreme Court, after reviewing the testimony before the New Jersey Board of Tax Appeals (and considering additional testimony, most of which was not material to the question here presented), found as follows:

> "The facts in the case at bar are practically identical, save as to the names of the parties, their respective addresses here and in New York, and the figures with those set forth in the case of

Newark Fire Insurance Company v. *State Board of Tax Appeals* (Supreme Court), 118 N. J. L. 525" (R. p. 45).

The findings and the conclusions with respect to the situs of the property taxed, are stated by the Supreme Court in its opinion in the *Newark Fire Insurance Company* case, as follows:

> "Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. * * *
>
> "FIRST: *As to jurisdiction to tax prosecutor in this State.* This question must, in the light of the proofs, be considered upon the inescapable premise that prosecutor had its business situs as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business situs in New York; but that prosecutor pays no personal property tax to the State of New York" (see Appendix, pp. 31-32).

This finding that the situs of the appellants and of their intangible property is in New York has not so far been questioned.

In the case of *Aetna Life Insurance Company v. Dunken*, 266 U. S. 388; 69 Law Ed. 342, at page 347, this Court said:

> "The rule is settled that the decision of a State court upon a question of fact ordinarily cannot be made the subject of inquiry here. See, for example, Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 639; Smiley *v.* Kansas, 196 U. S. 447, 453-454. To this general rule there are two equally well settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' Northern Pacific Ry. Co. *v.* North Dakota, 236 U. S. 585, 593, and cases cited. See also Traux *v.* Corrigan, 257 U. S. 312, 324-325."

It is submitted that the present case comes within the le as above stated and does not come within either of e exceptions.

There is no claim that a Federal right has been denied a result of a disputed finding of fact which is unsupted by the evidence. On the contrary, the appellants cept the findings of the New Jersey Supreme Court with spect to the situs of the property sought to be taxed, amply supported by the evidence. The appellants im that such findings are the most adverse possible to e right herein asserted by the State of New Jersey. The se, therefore, does not come within the first exception ted above, nor within the principle of *Beidler* v. *South rolina*, 282 U. S. 1, 75 Law Ed. 131, where the facts re in dispute and the findings of the State Court as the situs of the property sought to be taxed was favorle to the right asserted by the State.

Nor does the case come within the second exception laid down in the *Aetna Life Insurance* case. The conclusions of law and the findings of fact are not intermingled in any sense, but are separate and distinct. The New Jersey court has made a clear finding as to the situs of the property taxed upon facts which are not in dispute and based upon these facts has concluded as a matter of law that the property could be taxed in the State of New Jersey. The appellants accept the finding of fact and take exception solely to the conclusions of law. The case, therefore, presents a single question, which is purely a question of law.

The evidence in the present case supporting the foregoing finding will be found at pages 27 to 38 of the record. The following is a summary of such testimony:

Both the appellants, the Universal Insurance Company and the Universal Indemnity Insurance Company, are New Jersey corporations (R. p. 27). Both corporations on October 1, 1934, had registered offices at 810 Broad Street, in the City of Newark, New Jersey (R. p. 27). The principal business office of both corporations on October 1, 1934, was and previously had been at 111 John Street, in the City of New York (R. p. 30). All the business of both appellants was conducted from the New York office, through a Management Corporation, Talbot, Bird & Company, Inc., a New York corporation (R. p. 31). The business of the Universal Insurance Company is principally marine insurance, with some fire and inland marine insurance (R. p. 31). The business of Universal Indemnity Insurance Company is automobile liability and property damage insurance (R. p. 31). From their New York office both companies did business through agents throughout the United States (R. p. 31). All premiums collected by both companies were paid to the New York office (R. p. 31). All underwritings were reported by the agents to the New

York office for acceptance (R. p. 32). The auditing departments of both companies were at the New York office (R. p. 32). All bank accounts of both companies, with the exception of a small bank account at the National Newark & Essex Bank, in Newark, were in New York (R. p. 31). All securities owned by both companies on October 1, 1934, were in New York (R. p. 32), with the exception of securities deposited with the Superintendents of Insurance of the various States in which the companies did business, as a condition to doing business in such States (R. p. 32). Both companies had a service agency for writing insurance at No. 51 Clinton Street, in the City of Newark, and had other agents throughout the State of New Jersey, as in other States (R p. 31). The agents of the companies in Newark remitted to New York all premiums which were collected (R. p. 32). They had no control over the investment or management of the funds of the companies (R. p. 32). The securities deposited by the appellants with the New Jersey Commissioner of Insurance of the State of New Jersey, at Trenton, on October 1, 1934, were:

By the Universal Insurance Company, $60,000. of United States bonds.

By the Universal Indemnity Insurance Company, $50,000. of United States bonds and $150,000. of New Jersey Municipal Bonds (R. p. 34).

The balance sheets of appellants as of September 30, 1934, are set forth on pages 8 and 24 of the Record.

The Tax in Dispute.

As of October 1, 1934, the Board of Assessment and Revision of Taxes of the City of Newark made an assess-

ment of $500,000 against each of the appellants on their capital stock, paid-in and accumulated surplus, as the basis for taxation for the year 1935. On appeal to the Essex County Board of Taxation these assessments were reduced to the following figures (R. pp. 1 and 16):

Against the Universal Insurance Company	$455,400
Against the Universal Indemnity Insurance Company	$381,000

The computation of these assessments as reduced is set forth in the stipulations before the State Board of Tax Appeals, at pages 7 and 23 of the Record. The assessments were computed upon the entire capital stock and accumulated surplus of each corporation, adding thereto the unearned premium reserve and certain agency balances due, and deducting therefrom the exemptions allowed by law, to wit, bonds of the United States, bonds of municipalities of the State of New Jersey, and stocks of corporations. The bonds belonging to the appellants held by the Commissioner of Insurance of New Jersey were all included in such exemptions allowed by law, and therefore were not included in the property taxed (R. pp. 7, 23 and 33).

No attempt was made to separately value and tax the intangibles arising from the business conducted by the appellants in the State of New Jersey (R. pp. 7 and 23).

The history of the subsequent appeals appears at pages 3-4, *supra*, under the discussion of the grounds for jurisdiction.

Specification of Assigned Errors Intended to Be Urged

The appellants have heretofore adopted their assignments of error Nos. 1 and 2 (R. p 53) as their statement of the points to be relied on in conformity with Rule 13

and the same were duly filed (R. p. 59). The following are the assigned errors intended to be urged:

1. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, and in holding valid the assessments for personal property taxes for the year 1935, levied by the City of Newark, under Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey (Revised Statutes of New Jersey of 1937, Sections 54:4-1, 54:4-9 and 54:4-22) against the intangible personal property of appellants, constituting appellants' capital stock paid-in and accumulated surplus, because the business situs of appellants and of the intangible personal property assessed and taxed, on October 1, 1934, was located in the City and State of New York, beyond the jurisdiction of the taxing district of the City of Newark and the application of the said Sections of the Statute in holding said assessments valid, rendered the said Sections of the said Statute repugnant to the Fourteenth Amendment of the Constitution of the United States, depriving appellants of their property without due process of law and denying the appellants equal protection of the laws.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey was erroneous and illegal in affirming the judgment of the New Jersey Supreme Court, and in holding valid the assessments for personal property taxes for the year 1935, levied by the City of Newark against the intangible personal property of appellants, constituting appellants' capital stock paid-in and accumulated surplus, under Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of New Jersey (Revised Statutes of New Jersey of 1937, Sections 54:4-1, 54:4-9 and 54:4-22), because upon the assessing and taxing date, October 1, 1934, said intangible personal prop-

erty constituting appellants' capital stock, paid-in and accumulated surplus, was outside of the jurisdiction of the taxing district of the City of Newark, the business situs of appellants and of said taxed intangible personal property being on said date located in the City and State of New York, and the said Court in so holding said assessments valid, did administer and apply the said Sections of the said Statute so as to render them repugnant to the Fourteenth Amendment of the Constitution of the United States, depriving appellants of their property without due process of law, and denying the appellants the equal protection of the laws.

Summary of Argument.

1. Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey as construed and applied by the New Jersey Supreme Court and the Court of Errors and Appeals are in violation of the Fourteenth Amendment of the Constitution of the United States in that (a) said sections as so construed and applied operate to tax intangible property of the appellants which has its permanent situs in the State of New York and is beyond the jurisdiction of the taxing district of the City of Newark, and of the State of New Jersey; and (b) said sections as so construed and applied by the New Jersey Courts subject such property of appellants to multiple taxation.

2. The property sought to be taxed by the City of Newark is subject to taxation by the State of New York.

3. The fact that the appellants do not pay a personal property tax in New York is of no significance.

I

Sections 202, 301 and 307 of Chapter 236 of the Session Laws of 1918 of the State of New Jersey as construed and applied by the New Jersey Supreme Court and the Court of Errors and Appeals are in violation of the Fourteenth Amendment of the Constitution of the United States in that (a) said sections as so construed and applied operate to tax intangible property of the appellants which has its permanent situs in the State of New York and is beyond the jurisdiction of the taxing district of the City of Newark, and the State of New Jersey; and (b) said sections as so construed and applied subject such property of appellants to multiple taxation.

The statutes of the State of New Jersey, the validity of which is involved, are Chapter 236 of the Laws of 1918, Sections 202, 301 and 307. These statutes are printed in the appendix, pages 29 and 30.

The tax imposed by these sections is an *ad valorem* tax and not a franchise tax. (*Newark Fire Insurance Company* v. *State Board of Tax Appeals, supra.*) As we have seen above, the New Jersey Supreme Court, upon undisputed evidence, found that the business situs of the appellants was in New York and that the property sought to be taxed had become an integral part of its business situs in that State. In spite of this finding, the New Jersey Supreme Court, following its decision in the *Newark Fire* case, sustained the tax in question upon the theory that such property was, nevertheless, subject to tax by the State of the appellants' domicile. It based such decision squarely upon the decision of this Court in the case of *Cream of Wheat Company* v. *County of Grand Forks,* 253 U. S. 325. While recognizing that serious doubt had been cast on the authority of the *Cream of Wheat Company*

case by later decisions of this Court, the New Jersey Supreme Court went on to state:

> "While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the Cream of Wheat case. Until such time as that case is reconsidered we are bound by its holdings that there is a sufficient interrelation between the State of domicile and the intangibles which have acquired a business situs elsewhere to justify the imposition of a personal property tax by the former upon the latter" (Appendix, p. 34).

It is the contention of the appellants that the New Jersey Supreme Court reached a wrong conclusion as to the authority of the *Cream of Wheat Company* case in the present state of the law.

The decisions in the *Cream of Wheat* case and in the case of the *Citizens National Bank* v. *Durr*, 257 U. S. 99, which followed it, were based upon the following propositions:

1. That the limitation imposed by the Fourteenth Amendment that a State may not tax a resident for property which has acquired a business situs beyond its boundaries has no application to intangible property.

2. That the Fourteenth Amendment does not prohibit double taxation.

It is respectfully submitted that the decisions of the Supreme Court, since these decisions were rendered, have departed entirely from these propositions.

At the time the *Cream of Wheat* case and the *Citizens National Bank* case were decided, this Court had already held in *Union Transit Company* v. *Kentucky*, 199 U. S. 194, that a State could not, under the Fourteenth Amendment, tax the tangible personal property of a domestic corporation which had a permanent situs outside the State.

At page 202 of its opinion in that case, the Court made the following statement with respect to the basis of the power to tax:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. * * *"

The protection of the Fourteenth Amendment against double taxation, however, at that time had not been extended to intangible personal property. *Blackstone* v. *Miller*, 188 U. S. 189, 47 Law Ed. 439, and the cases which followed it, sustaining the principle of the multiple taxation of intangible property, were still the law, and remained the law down to the decision of this Court in *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204; 74 Law Edition 371.

In the *Farmers Loan & Trust Company* case this Court held that a State could not impose an inheritance tax upon debts owing by a resident of the State to a non-resident decedent, but that such debts were subject to taxation at the domicile of the creditor. In this decision the Court considered the possible places for the taxation of debts and defi-

nitely set its face against the double taxation of such property. We quote from the decision, pages 209, 210:

"Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; a third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each state can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise.

"In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment.

* * * * * *

"Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment, two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. *Union Refrig. Transit Co.* v. *Kentucky, supra, Rhode Island Trust Co.* v. *Doughton, supra,* and *Safe Deposit & Trust Co.* v. *Virginia, supra,* stand in opposition.

* * * * * *

"While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with

taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co.* v. *Kentucky, supra,* declared: '* * * in view of the enormous increase of such property (tangible personalty) since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt (it) at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction."

The principles laid down in the *Farmers Loan & Trust Company* case, that between the States of the Union the same property, whether tangible or intangible, shall not be subject to taxation in more than one State, and that the power to tax intangible property is determined by its situs, as in the case of tangible property, have been firmly established by the decisions of this Court since that decision. The establishment of these principles cannot be better stated than in the following excerpt from the opinion of this Court in *Burnet* v. *Brooks*, 288 U. S. 378, at page 401:

"Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be ascertained in each case with appropriate regard to the distinct spheres of activity of State and Nation. The limits of State power are defined in view of the relation of the States to each other in the Fed-

eral Union. The bond of the Constitution qualifies their jurisdiction. This is the principle which underlies the decisions cited by respondents.* These decisions established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State and that jurisdiction to tax was restricted accordingly. In *Farmers Loan & Trust Co.* v. *Minnesota, supra,* the Court applied the principle to intangibles, and referring to the contrary view which had prevailed, said (p. 209): 'The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII: The practical effect of it has been bad; perhaps two-thirds of the States have endeavored to avoid the evil by resorting to reciprocal exemption laws.' It was this 'rule of immunity from taxation by more than one State,' deducible from the decisions in respect of various and distinct kinds of property, that the Court applied in *First National Bank* v. *Maine, supra,* page 326.

"As pointed out in the opinion in the *First National Bank* case, the principle has had a progressive application. In *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, the question related to a ferry franchise granted by Indiana to a Kentucky corporation, which Kentucky attempted to tax. Despite the fact that the tax was laid upon a property right belonging to a domestic corporation, the Court held that the Fourteenth Amendment precluded the imposition. Id., p. 398. In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, the principle was applied to the attempted taxation by Kentucky of tangible personal property which was owned by a domestic corporation but had

* The cases referred to by the Court earlier in the opinion as having been cited by the respondent were: *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312.

a permanent situs in another State. The Court decided that where tangible personal property had an actual situs in a particular State, the power to subject it to state taxation rested exclusively in that State regardless of the domicile of the owner. By *Frick* v. *Pennsylvania*, 268 U. S. 473, the rule became definitely fixed that as to tangible personal property the power to impose a death transfer tax was solely in the State where the property had an actual situs, and could not be exercised by another State where the decedent was domiciled. See *First National Bank* v. *Maine, supra*, p. 322. The decision in *Farmers Loan & Trust Co.* v. *Minnesota, supra*, overruling *Blackstone* v. *Miller*, 188 U. S. 189, carried forward the principle by applying it to intangibles. The Court was of the opinion that 'the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation is matter of the greatest moment.' 280 U. S. pp. 211, 212."

To review in further detail the cases cited in the foregoing opinion, would seem to serve no useful purpose. As therein stated, they have conclusively established that the limitations of the Fourteenth Amendment apply to the taxation of intangible property as well as of tangible property, and that today intangible property, like tangible property, is subject to taxation in only one State of the United States.

While the cases in which this principle was laid down by this Court have in the main involved the right of the State of the owner's domicile to impose a tax to the exclusion of other States, the Court has clearly indicated that it is aware that the same rule might exclude a tax by the State of the owner's domicile. In the case of

Farmers Loan & Trust Company v. *Minnesota, supra,* at the conclusion of the opinion, page 213, evidently to dispel any inference that the application of the rule against double taxation in the instant case to sustain the power of the state of the owner's domicile to tax, impaired the principle of the separate business situs of intangible property, the Court said:

> "*New Orleans* v. *Stempel,* 175 U. S. 309, *Bristol* v. *Washington County,* 177 U. S. 133, *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

In *First National Bank* v. *Maine,* 284 U. S. 312, at page 331, the Court said:

> "We do not overlook the possibility that shares of stock, *as well as other intangibles,* may be so used in a State other than that of the owner's domicile as to give them a situs analogous to the actual situs of tangible personal property. See Farmers Loan Company case, *supra,* at page 213. That question heretofore has been reserved and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration."

In other cases decided since the *First National Bank* case this Court has made the same reservation. In the recent case of *New York ex rel. Whitney* v. *Graves,* 299 U. S. 366; 81 Law Ed. 285, in which this Court sustained a tax by the State of New York upon a membership in the New York Stock Exchange owned by a resident of another State, the Court, referring to the case of *Citizens National Bank* v. *Durr, supra* at page 373 said:

> "In *Citizens National Bank* v. *Durr,* 257 U. S. 99, a membership in the New York Stock Exchange,

owned by a resident of Ohio, was held to be subject to taxation at his domicile. But the Court was careful not to question the jurisdiction of the State of New York to tax 'the membership privileges exercisable locally' in that State * * * and *what the Court said with respect to double taxation must be read in the light of the decisions in Farmers Loan & Trust Co.* v. *Minnesota, supra, and later cases upon that point.* See *Wheeling Steel Corp.* v. *Fox, supra.*" (Italics ours.)

This was a clear intimation by the Court that the decisions in the *Cream of Wheat* and *Citizens National Bank* cases were inconsistent with the subsequent cases of the Court.

It is respectfully submitted that the time has come for this Court to hold that the rule laid down in the *Cream of Wheat Company* case and in *Citizens National Bank* v. *Durr*, that the Fourteenth Amendment does not prohibit double taxation and that a State may tax a resident on intangible property which has acquired a permanent situs beyond its borders, is no longer the law.

II

The property of appellants sought to be taxed by the City of Newark is subject to taxation only by the State of New York.

Assuming that under the Fourteenth Amendment as interpreted by the decisions above referred to intangible property cannot be subjected to taxation by more than one State, the question arises—Is the property here sought to be taxed subject to taxation by any other State than New Jersey? The answer to this inquiry is found in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193; 80 Law Ed. 1143; and in *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234; 81 Law Ed. 1061.

In the *Wheeling Steel Corp.* case the Court held that when a Delaware corporation maintained its principal business office in West Virginia from which its entire business was managed and directed, all its accounts receivable and bank balances (except such as the parties agreed were applicable to the business conducted in Ohio) thereby acquired a business situs in West Virginia and were subject to taxation there. It was argued that such a decision would subject the intangibles in question to the possibility of double taxation by Delaware, the State of domicile. Upon this point the Court made the following observations, page 210 of the opinion.

> "It is appellant's contention that the State creating a corporation has the sole right to tax its intangible property 'unless such intangible property has acquired a "business situs" elsewhere.' Counsel for the State agrees with appellant on this point and in fact asserts 'that, generally, the taxable situs of accounts receivable and of money in bank is at the domicile of the owner.' But the State insists that the accounts receivable and bank deposits of the Wheeling Steel Corporation had acquired a taxable situs in West Virginia and that they have no taxable situs in Delaware, where the Corporation was chartered.
>
> "Second.—The Corporation complied with the laws of the State of its creation in designating its 'principal' office in that State. It is manifest that this designation, while presumably sufficient for the purpose, was a technical one and that the office is not a principal office so far as the actual conduct of business is concerned. While a duplicate stock ledger and records of transactions with respect to capital stock are maintained in Delaware, the business operations of the Corporation are conducted outside that Sta[illegible] • • • To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due

process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location."

The case of *First Bank Stock Corporation v. Minnesota*, applied the principle of the *Wheeling Steel Corporation* case, to the taxation by the State of Minnesota of the shares of stock in various foreign corporations owned by a Delaware corporation which had its commercial domicile in Minnesota.

In view of the findings of the New Jersey Court, supported by ample evidence, that the appellant corporations had their business situs in the State of New York and that the property herein sought to be taxed was an integral part of such situs, there can be no doubt that under the authority of the *Wheeling Steel Corporation* and *First Bank Stock Corporation* cases such property was subject to taxation by the State of New York. In view of this fact, it follows under the rule laid down in the foregoing cases that such property cannot be subject to taxation in the State of New Jersey. See *Farmers Loan & Trust Co.* v. *Minnesota, supra*, and *First National Bank* v. *Maine, supra.*

The following State decisions present the question which is raised on the present appeal and sustain the appellants' position:

Miami Coal Company v. *Fox*, 203 Ind. 99. This case involved the taxation by Indiana of the intangible personal property—bills and accounts receivable—of a domestic corporation. The corporation operated coal mines in Indiana and all of its intangibles resulted from the sale of coal mined in that State. It maintained its principal office, however, in Illinois, from which its coal was sold and its financial affairs were managed and con-

trolled. It was held by the Supreme Court of Indiana that the intangibles of the corporation had no taxable situs in Indiana but that the taxable situs was in Illinois. In the course of its opinion the Court said at pages 113 and 114:

> "It has been suggested by the Supreme Court of the United States that, if the principles of taxation were homogeneous throughout the country and the individual States, property would be subject to taxation in but one of such jurisdictions. This is the foundation for the inference that property such as here in question ought to have one situs and one situs only. Either the gaining of a so-called business situs should emancipate the property from taxation at the domicile of the owner or the judicial construction of the principle upon which the so-called business situs is founded should be abolished. *Kidd* v. *Alabama* (1903), 188 U. S. 730, 732; • • • *Hawley* v. *City of Malden* (1914), 232 U. S. 1. • • •
>
> "The contention of the appellees under the last question stated is peculiar and unique in contending that intangible personal property may have two situses, one a business situs and the other a taxable situs.
>
> "Admitting that the property has a business situs in Illinois and a taxable situs in Indiana, the only foundation for the property being subject to taxation is the ancient maxim *mobilia sequuntur personam*. The seed of this maxim was not begotten by taxation. The rule is but a legal fiction to the effect that for legal purposes the situs or home of personal property is always at the domicile of its owner but this maxim may not be a premise or used in reasoning to the determination of the situs of the property for the purpose of taxation."

Commonwealth v. *Appalachian Power Co.*, 159 Va. 462 (1932), certiorari denied 288 U. S. 613. In this case it was held that the State of Virginia could not tax certain bonds

owned by a domestic corporation which were deposited in New York with a trustee as collateral for a bond issue. In its opinion, after reviewing the decisions of the United States Supreme Court on the subject, the Court said, page 468:

> "The conclusions from these opinions summarized by counsel for petitioner seem inescapable: (1) that no property can be subjected to taxation by more than one state; * * *. (3) that the tax situs of tangibles (like real estate) is in the State where they are located, the fiction of *mobilia sequuntur personam* being no longer applicable to tangibles; * * * (5) that where intangibles are sought to be taxed the fiction of *mobilia sequuntur personam* may be applied, but this fiction must give way to the fact of legal title, possession and control in another State."

See also *Commonwealth* v. *Madden*, 265 Ky. 684 (1936), and *Matter of Brown*, 274 N. Y. 10 (1937).

III

The fact that the appellants do not pay a personal property tax in New York is of no significance.

The New Jersey Supreme Court in sustaining the tax here under review has seemed to attach great importance to the fact that the appellants pay no personal property tax to the State of New York (see Appendix, p. 34). It is respectfully submitted that such fact is of no significance. The jurisdiction of the State of New Jersey to impose a tax upon property which has its situs beyond its borders cannot be affected by whether the State in which the property has its situs taxes such property or not. This is a matter of domestic policy of the State in question, here the State of New York.

> "But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio."

Buck v. *Beach*, 206 U. S. 392, at page 402.

See also, *Commonwealth* v. *Appalachian Power Company, supra,* in which the Court said at page 471 of its opinion:

> "The fact that the State of New York imposes no such tax on this class of property is immaterial. The controlling question is, has that State the right to tax the property? We think it has. If so, Virginia, under the decisions, has no such right."

It is true that the State of New York at the present time does not impose a tax on personal property, whether tangible or intangible. Tax Law, Consolidated Laws of New York, Chapter 60, Article 1, Section 3. This section, however, must be considered in the light of other taxes imposed upon corporations by the State of New York. These taxes for foreign business corporations take the form of a license tax upon the portion of their capital employed within the State (Consolidated Laws, Chapter 60, Article 9, Section 181) and a franchise tax based upon the proportion of their aggregate income allocated to the State of New York (Consolidated Laws, Chapter 60, Article 9-a, Sections 209, 214). In the case of insurance companies, these taxes take the form of taxes based upon the amount of premiums collected in the State. See Tax Law, Consolidated Laws, Chapter 60, Article 9, Section

187; Insurance Law, Consolidated Laws, Chapter 28, Sections 133, 137 and 169-a. It is of record in this case that the appellants paid premium taxes to the State of New York (R. p. 33).

The policy of the State of New York with respect to the exemption of personal property from taxation can be changed at any time and it is respectfully submitted that the right of New Jersey under the Fourteenth Amendment to tax property which has its situs in New York cannot be predicated upon any such uncertainty.

Conclusion

The question which is before the Court cannot be better stated than in the following excerpt from a recent work "Double Taxation of Property and Income" by Professor A. L. HARDING, published in 1933 by the Harvard University Press:

> "* * * The Court, if it is to continue its praiseworthy movement against double taxation of intangibles, must within the near future either strike down these categories (business situs of credits and corporate excess) as the basis of independent situs, or forbid the taxation of such intangibles at the domicil. That it should do the first is almost inconceivable. These two types of intangibles owe their entire value to the society into which they are integrated. They are engaged in keen competition with capital and credits belonging to persons within that society. To remove from taxation credits belonging to nonresidents, and in competition more or less permanently with local credits and capital, would have most serious economic consequences. The only answer to be allowed is that the domiciliary taxation must cease. The *mobilia* maxim is but a fiction, a presumption of fact. It has never been more than that, no matter with what pomp it has been chanted. We have in these two cases, business situs and corporate excess, facts which

show that the fiction is entirely false to the facts, and that the presumption based thereon has been entirely overcome. The Court must do precisely the thing which it first did in the *Union Transit* case, and hold that the domiciliary taxation must cease."

We submit that the question as thus stated has already been answered by this Court in the recent cases of *Wheeling Steel Corporation* v. *Fox, supra; First Bank Stock Corporation* v. *Minnesota, supra; State ex rel. Whitney* v. *Graves, supra.*

It is respectfully submitted that the judgment of the New Jersey Court of Errors and Appeals should be reversed.

Respectfully submitted,

JOHN G. JACKSON,
J. G. SHIPMAN,
PAUL B. BARRINGER, JR.,
Attorneys for Appellants.

New York, January , 1939.

APPENDIX

EXHIBIT A

Statutes of the State of New Jersey, the validity of which is involved in this proceeding:

Second.

Statute of the State the validity of which is involved.

Chapter 236 of the Laws of 1918,

Section 202:

"All property, real and personal, within the jurisdiction of this state, not expressly exempted by this act or excluded from its operation, shall be subject to taxation annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal property shall be personally liable for the taxes thereon. (P. L. 1918, p. 848.)"

Section 301:

"The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. * * * [Balance of Section 301 not material to this proceeding.] (P. L. 1918, p. 853, as amended by P. L. 1920, p. 561.)"

Section 307:

"Every fire insurance company and every stock

be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section. (P. L. 1918, p. 858.)"

These sections were in effect at the time this tax was levied, but have since been revised and are now found in Revised Statutes of New Jersey, 1937, Sections 54:4-1, 54:4-9 and 54:4-22:

"54:4-1. Property subject to tax; date of assessment. All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of nonresidents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."

54:4-22—Same; Section 30[illegible]

EXHIBIT B

NEW JERSEY SUPREME COURT

MAY TERM, 1937.

No. 208.

NEWARK FIRE INSURANCE COMPANY, *Prosecutor*,

v.

STATE BOARD OF TAX APPEALS and CITY OF NEWARK, a Municipal Corporation of the State of New Jersey, *Respondents*.

Submitted May —, 1937. Decided August 31, 1937.

On Certiorari.

Before Justices Bodine, Heher and Perskie.

For prosecutor: Arthur T. Vanderbilt.
For respondents: Frank A. Boettner, John A. Matthews.

The opinion of the court was delivered by PERSKIE, *J.*:

The question before us concerns the validity of the personal property assessment made by the City of Newark on October 1, 1934, for the year 1935 against prosecutor. The assessment was made in accordance with our general tax act. P. L. 1918, chap. 307, p. 858, as amended.

Prosecutor is a general fire insurance company organized under the laws of this state with its registered office at 31 Clinton Street, in the City of Newark. For six years prior to the assessment its main and executive offices have been and now are at 150 William Street, in the City of New York. Prosecutor's general business is conducted in New York, and all the books of the company, except those required by law to be kept at its registered office in New

Jersey, are located there. Although a small amount of cash and some few securities are kept in New Jersey so that business may be done here, the great majority of these items is either in the New York Offices or in banks in that State. The business conducted at the Newark office is confined to local regional underwriting and the adjustment of claims arising therefrom. Reports on such business are sent to the main office in New York. The record also discloses that prosecutor pays no personal property tax in New York, and, for aught that appears, no such tax is exacted by that State.

The State Board of Tax Appeals affirmed the assessment as made by the taxing authorities of Newark thereby assessing the intangible property owned by prosecutor. This court granted certiorari and prosecutor argues that the assessment as made should be reduced because (1) New Jersey has no jurisdiction to tax the intangibles; and (2) because it was error to include the item of unearned premium reserve as a taxable asset.

First. *As to jurisdiction to tax prosecutor in this State.* This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York.

It is fundamental that jurisdiction to tax depends primarily on the type of tax sought to be exacted and the property that is subject to the tax. Here the tax, under the act, is a personal property tax. The property subject to the tax constitutes securities which represent paid in capital stock and accumulated surplus of the company. Such securities are clearly intangibles. It is well settled that intangible personalty is taxable at the domicil of the owner. Kirtland *v.* Hotchkiss, 100 U. S. 491; Blodgett *v.*

Silberman, 277 U. S. 1; Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204. That principle finds its support in the legal maxim *mobilia sequuntur personam.* The use of this maxim like the use of most other maxims in jurisprudence, is not the solution of the problem; it is merely a formal and unexplanatory statement of a legal conclusion. Cf. 9 Harvard Law Review 13; 8 Am. L. Rev. 519. Thus frequently its use is not very helpful. But since contrary to the case of tangibles, intangibles have no actual *situs*, are not physically under the definite control of any one jurisdiction, the rule, as embraced in the maxim developed is justified even to this day as a rule of convenience. Convenience however brings hardship. So it was not long before exceptions to the general rule as stated gradually found and worked themselves into the law. Thus it has been held that where intangible personal property became an integral part of a business carried on in a state other than that of the domicil of the owner of the intangibles, then that other state, the state wherein the intangibles acquired a "business *situs*" had jurisdiction to levy a personal property tax upon these intangibles. New Orleans *v.* Stempil, 175 U. S. 309; Metropolitan Life Ins. Co. of N. Y. *v.* New Orleans, 205 U. S. 395; Wheeling Steel Corp. *v.* Fox, 298 U. S. 193; Safe Deposit & Trust Co. *v.* Virginia, 280 U. S. 583; Farmers Loan & Trust Co. *v.* Minnesota, 230 U. S. 204; First National Bank of Boston *v.* Maine, 284 U. S. 312, see 76 A. L. R. 806. Conceding the application of this exception to the general rule, the problem soon arose as to whether, when the "business *situs*" theory did apply, the state of the domicil could still tax. The answer to that question is not free from serious doubt, a doubt which the Supreme Court of the United States has sounded notwithstanding its holding that the state of the domicil might tax even though the "business *situs*" theory applied. Cream of Wheat Co. *v.* County of Grand Forks, 253 U. S. 325. It is interesting to observe the growing tendency of this

doubt. It manifests itself both prior to and subsequent to the holding in the Cream of Wheat case. For example, in the case of Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, decided prior to the Cream of Wheat case, and in the case of Frick *v.* Pennsylvania, 268 U. S. 473, (overruled on other grounds) it was held that tangible property may be taxed only by one state; and again the court has held, since the Cream of Wheat case, that in the absence of the applicability of the "business *situs*" exception, only the state of the domicil might tax intangibles. Farmers Loan & Trust Co. *v.* Minnesota, *supra;* Baldwin *v.* Missouri, 281 U. S. 586; Beidler *v.* South Carolina Tax Commission, 282 U. S. 1; First National Bank of Boston *v.* Maine, *supra.* In so holding the court was very careful to point out, notwithstanding its holding in the Cream of Wheat case, that the question involving the right of the domiciliary state to tax when the "business *situs*" exception applied is an open one. Decision thereof has been expressly reserved. Cf. Farmers Loan & Trust Co. *v.* Minnesota, *supra,* at p. 213, and First National Bank of Boston *v.* Maine, *supra;* at p. 331. While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the Cream of Wheat case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicil and the intangibles which have acquired a business *situs* elsewhere to justify the imposition of a personal property tax by the former upon the latter.

Nor do we, by so deciding run afoul of the strong modern sentiment against multiple taxation as manifested by the United States Supreme Court. See Farmers Loan & Trust Co. *v.* Minnesota, *supra,* at p. 212; First National Bank of Boston *v.* Maine, *supra,* at p. 326, 334. For, as has been pointed out, prosecutor pays no personal property tax in New York. Thus under the circumstances here exhibited multiple taxation is impossible. Prosecutor

may not invoke the dictum that "the rule of immunity from taxation by more than one state * * * is broader than the application thus far made of it." First National Bank of Boston *v.* Maine, *supra*, at p. 326.

Second. *As to the item of unearned premium reserve.* We are aware of the fact that sound accounting practice may require this item to be booked as a liability. Nor are we unmindful of the many things that may be said in favor of such a requirement. Modern statistical analyses available to companies in the position of prosecutor may and do compute to a very accurate degree just what part of such reserve will be expended each year. But companies control the fund so set up. They invest them and earn a return upon them. Because of these factors our sister states have divided upon the answer to this problem. See 13 A. L. R. 189, *et seq.* Our Court of Errors and Appeals has taken the position that this item, at least for the purpose of taxation, should be considered an asset. City of Trenton *v.* Standard Fire Ins. Co., 77 N. J. L. 575, 73 At. 606. Whether the reserve set up consists of exempt securities, and the exemption of the reserve fund as claimed would thus result in a double deduction is not made clear. But be that as it may, this court is bound by the decision in the case of City of Trenton *v.* Standard Fire Ins. Co., *supra.*

Third. The parties stipulated before the Board that prosecutor had cash on hand or on deposit as of October 1, 1934 of $532,784.54 of which amount the sum of $6,425.32 was deposited in banks of New Jersey and the balance of $526,359.22 represents cash on hand in either the New York office or on deposit in New York banks. The State Board determined that this item was exempt under P. L. 1933, chap. 165, p. 346. Respondents argument that this determination is incorrect, if properly before us, is sound. Prosecutors cash on hand or on deposit of October 1, 1934

was not exempt; it was taxable. Newark *v.* State Board of Tax Appeals, 118 N. J. L. 131, 191 At. 843. We are, of course, under section 11 of our Certiorari act (1 C. S. (1709-1910) p. 402-406), obliged to "determine disputed questions of fact as well as of law * * *" but that, under the circumstances exhibited and generally stated, means disputes, as to facts or law or both, properly raised. Is the point properly before us? We think not. True, it was raised and disputed before the State Board of Tax Appeals; the latter passed judgment upon it. But it is also true that, save as to the argument made here upon the point, respondents permitted the judgment of the Board to stand unchallenged. It cannot now properly be heard to complain. The fact of the matter is that, notwithstanding its argument to the contrary, respondents conclude their brief with the submission "that the judgment of the State Board of Tax Appeals should be affirmed and the writ of certiorari dismissed."

The judgment of the State Board of Tax Appeals is, therefore, affirmed with costs.

A true copy.

FRED L. BLOODGOOD,
Clerk.

P 7
P 2 -- 7 remainder.

SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—October Term, 1938.

Newark Fire Insurance Company, Appellant, 449 *vs.* State Board of Tax Appeals and The City of Newark.	Appeals from the Court of Errors and Appeals of the State of New Jersey.
Universal Insurance Company and Universal Indemnity Insurance Company, Appellants, 456 *vs.* State Board of Tax Appeals of the State of New Jersey and the City of Newark.	

[May 29, 1939.]

Mr. Justice Reed announced an opinion in which the Chief Justice, Mr. Justice Butler and Mr. Justice Roberts concurred.

The controversy in No. 449 relates to the jurisdiction of New Jersey to tax the appellant upon the full amount of its capital stock paid in and accumulated surplus. The case is here by appeal under Section 237(a) of the Judicial Code.[1]

Chapter 236 of the Laws of 1918[2] is a general act for the assessment and collection of taxes. Section 202 subjects all real and personal property within the jurisdiction of New Jersey to taxation annually at its true value. By Section 301 the tax on other than tangible personal property is assessed on each inhabitant in the taxing district of his residence on the first day of October in each year. Section 305 deals with domestic corporations as residents of the district in which their chief office is located and renders their personal property taxable in the same manner as that of

[1] 28 U. S. C. § 344(a).

[2] N. J. Laws 1918, p. 847; also in N. J. Rev. Stats. 1937, § 54:4.

individuals, except as otherwise provided. Section 307, the most vital in the case, provides:

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; . . . no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section."

The appellant is a stock fire insurance corporation organized under the laws of New Jersey which at the time of this assessment required it to locate its principal office and to conduct its general business in the state.[3] It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law requires to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's "executive officers and its executive office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of $6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago." No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums.

The Board of Assessment of the City of Newark made an assessment, as of October 1, 1934, upon the capital stock paid in and accumulated surplus of the appellant, with deductions for debts and exemptions allowed by law. The assessment was sustained, in succession, by the Essex County Board of Taxation, by the New Jersey State Board of Tax Appeals, now an appellee, by the

[3] N. J. Laws 1902, c. 134, section 3, second, 408; N. J. Laws 1929, c. 6, section 3, second, p. 18, and c. 47, section 1, p. 82. By c. 164 of N. J. Laws 1937, this was amended to read that the certificate of incorporation must set forth "the place where the principal office of the said company in this State is to be located."

Supreme Court,[4] and by the Court of Errors and Appeals, the highest court in the state.[5] Throughout the proceedings below the appellant resisted the jurisdiction of New Jersey to tax on the ground that its intangibles had acquired a business situs and the corporation a tax domicile in New York. Throughout, the state tribunals treated the assessment as upon personal property with a business situs in the sister state. The Supreme Court characterized the exaction as a personal property tax and discussed its validity "in the light of the proofs . . . upon the inescapable premise that . . . the securities, the personalty involved, have become an integral part of [appellant's] business *situs* in New York . . . ."[6] It held that the state of domicile may impose a personal property tax upon intangibles which have acquired a business situs in another state and added that, in the absence of a New York personal property tax, multiple taxation was impossible. The Court of Errors and Appeals of New Jersey, per curiam, affirmed the judgment for the reasons expressed in the opinion of the Supreme Court.[7]

Appellant urges error in sustaining the assessment in the face of the conclusion that the tax is a property tax upon intangibles with a business situs in New York, the commercial domicile of the corporation. Such approval, it is claimed, violates the due process clause of the 14th Amendment.

The present tax, as administered, is levied upon an assessment of the full amount of capital stock and surplus. It is a tax on the net value of the corporation less allowable deductions, reached by taking liabilities from gross value of assets and subtracting exempt items from the remainder. This is apparently because capital stock and surplus are treated as invested in the exempt assets.[8] The value thus assessed is not determined by specific items but is the result of a calculation in which all assets are involved except those definitely exempted. Our conclusion makes it unnecessary to resolve doubts as to whether this is a property tax.

When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the

[4] 118 N. J. L. 525.
[5] 120 N. J. L. 185.
[6] 118 N. J. L. at 526.
[7] 120 N. J. L. 185.
[8] Fidelity Trust Co. v. Board of Equalization, 77 N. J. L. 128, 130.

jurisdiction, of its creator.[9] There it must dwell.[10] The dominion of the state over its creature is complete.[11] In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty,[12] the presumption is that such property is taxable by the state of the corporation's origin.[13] This power of New Jersey to tax is made effective by section 307 of the Act of 1918, heretofore quoted. It is the only tax sought by the state from corporations of this type as the franchise tax, at one time levied,[14] was repealed by the Act of April 8, 1903.[15]

There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state.[16] The carrying on of the business of the corporation in New York, it is urged, has withdrawn its intangibles completely from the tax jurisdiction of New Jersey. With the assumption of a business situs and commercial domicile in New York, that state, under the authorities cited, would have the right to tax intangibles with this relation to its sovereignty. Appellant contends that if New York may levy a property tax on these intangibles, it will violate the due process clause of the 14th Amendment to permit New Jersey to do the same thing; that property cannot be in two places; that if it is in New York for tax purposes, it cannot be in New Jersey. We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been

[9] Lafayette Insurance Co. v. French, 18 How. 404; St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 429; Seaboard Rice Milling Co. v. Chicago, R. I. & P. R. Co., 270 U. S. 363, 366; Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642. Cf. International Milling Co. v. Columbian Transp. Co., 292 U. S. 511, 519.

[10] Bank of Augusta v. Earle, 13 Pet. 519, 588.

[11] Oklahoma Gas Co. v. Oklahoma, 273 U. S. 257, 259; Canada Southern Ry. v. Gebhard, 109 U. S. 527, 537-38.

[12] Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 92; Blodgett v. Silberman, 277 U. S. 1, 9.

[13] Cream of Wheat v. Grand Forks, 253 U. S. 325, 329; Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 19; First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 237. Cf. Johnson Oil Co. v. Oklahoma, 290 U. S. 158, 161.

[14] Act of April 18, 1884, N. J. Laws 1884, c. 159, p. 232.

[15] N. J. Laws 1903, c. 208, p. 394.

[16] New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; State Board v. Comptoir National D'Escompte, 191 U. S. 388; Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395; Liverpool and L. & G. Co. v. Board of Assessors, 221 U. S. 346; Wheeling Steel Corporation v. Fox, 298 U. S. 193; First Bank Stock Corp. v. Minnesota, 301 U. S. 234.

heretofore reserved.[17] We do not find it necessary to answer it in this case.

Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a Federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court.[18]

In the *Stempel, Bristol, Comptoir National, Metropolitan* and *Liverpool* cases, cited in note 16, *supra*, the integration of the foreign-owned intangibles with local activities was evident from the continued course of business. The presence or absence of the evidences of the credits from the jurisdiction was immaterial.[19] The non-resident individuals and corporations carried on continuously a course of lending money or granting credits within the taxing states. The taxed intangibles grew out of these transactions. They were, in fact, a part of them. In the *Wheeling Steel* case, the same type of amalgamation occurred. West Virginia sought to tax a Delaware corporation on accounts receivable and bank deposits. The opinion points out, pages 212 and 213, that these choses in action were the indebtedness for or the proceeds of sales confirmed in West Virginia, attributable "to the place where they arise in the course of the business of making contracts of sale." In *First Bank Stock Corporation* v. *Minnesota* another Delaware corporation was found to have established a commercial domicile for itself and given a business situs to certain of its intangibles. The intangibles in question were stocks of Montana and North Dakota state banks, purchased and held as part of the corporation's assets in its Minnesota business of holding the shares and managing, through stock ownership, the business of numerous banks, trust companies and other financial institutions of the Ninth Federal Reserve District. As this business was localized in Minnesota, the stocks of these banks were an essential factor of that business and therefore had a taxable situs in Minnesota.

[17] First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 237, 241. Cf. Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204, 213; First Nat. Bank v. Maine, 284 U. S. 312, 331.

[18] Beidler v. So. Car. Tax Commission, 282 U. S. 1, 8 and cases cited.

[19] Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395, 402.

The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a tax situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation. To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity. The facts presented by this record fall far short of this requirement.

The tax is upon "the full amount of capital stock and surplus" less certain allowed deductions of real estate and exempt securities. The evidence gives no explanation of the amount or source of the assets making up the amount $3,370,080.66 which balances with the capital stock and surplus less these deductions. The stipulation shows "agreed" figures. $8,107,901.83 presumably of capital and surplus, as shown below.[20] Agreed deductions are $4,737,821.17. But the assessment is $1,069,000. From the stipulation, we learn the "general accounts" are kept in New York City and all cash except $6,425.32 and all securities are located at the New York office or in banks outside of New Jersey. If we assume that the "general accounts" mentioned are the company's claims against agents, other insurance companies, and similar bills receivable, no progress is made towards their identification with New York business. Nothing is shown as to the volume of New York business in comparison with New Jersey or the other states. We are not told

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[20] "(a) The following figures have been agreed upon. In the first column appears the designation of what the fund represents; opposite each designation appearing the amount of the fund in question:

1.	Capital stock	$2,000,000.00
2.	Surplus (as set forth in the books of the company)	2,982,940.29
3.	Reserve for unearned premiums	3,001,623.46
4.	Reserve for taxes	71,765.65
5.	Reserve for contingencies	68,915.35
6.	Reserve for reinsurance	4,228.36
7.	Agency balances over 90 days old	119,109.72
8.	Furniture and fixtures (in Newark office)	1,500.00
	Total	$8,250,082.83

Reserves for unearned premiums and for reinsurance are a taxable asset. New Jersey. City of Trenton v. Standard Fire Ins. Co., 77 N. J. L. 757, 765. The Board of Tax Appeals held the agency balances an asset, and the reserve for taxes a liability which is deductible. Nothing was said about the reserve for contingencies. Addition of the items known to constitute assets, capital stock, surplus, reserve for unearned premiums, reserve for reinsurance, agency balances—equals $8,107,901.83.

where business is accepted, moneys collected or insurance contracts made. The securities may represent local loans or investments in New Jersey or elsewhere made from funds derived from similar insurance contracts with a business situs at those points.[21] They may be the result of insurance activities of many kinds, taking place far from New York. If we were to assume that the intangibles of a corporation may have only one taxable situs, the mere fact that general affairs of a foreign corporation are conducted by general officers in New York without further evidence of the source and character of the intangibles does not destroy the taxability of a part of these intangibles by the state of the corporation's legal domicile. The presumption of a taxable situs solely in New Jersey is not overturned.

Universal Insurance Company and Universal Indemnity Insurance Company have appeals involving the same questions. By stipulation these cases were consolidated for review below and appeal here.

These appellants are New Jersey insurance corporations, assessed by the City of Newark in the same way, under the same statute and with the same result in the state courts as the appellant in No. 449. There are no significant distinctions between the cases. A management corporation handles these companies at a New York office, where accounts are payable. Seven per cent of the business of Universal Insurance Company originates in New Jersey. The corresponding percentage for the other company is not shown. As in No. 449, the record is silent as to the character, source and use of the securities and credits.

The judgments in both cases are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[21] Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395.

SUPREME COURT OF THE UNITED STATES.

Nos. 449 and 456.—October Term, 1938.

Newark Fire Insurance Company, Appellant,
449 *vs.*
State Board of Tax Appeals and The City of Newark.

Universal Insurance Company and Universal Indemnity Insurance Company, Appellants,
456 *vs.*
State Board of Tax Appeals of the State of New Jersey and the City of Newark.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

[May 29, 1939.]

Mr. Justice Frankfurter announced the following opinion, concurred in by Mr. Justice Stone, Mr. Justice Black, and Mr. Justice Douglas.

Wise tax policy is one thing; constitutional prohibition quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statesmen. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government[1] which should not be constrained by

[1] Compare **Anderson v. Dunn, 6 Wheat 204, 226: "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment."**

rigid and artifical legal concepts. Especially important is it [illegible] abstain from intervention within the autonomous area of the le[illegible] islative taxing power where there is no claim of encroachment b[illegible] the states upon powers granted to the national government. I[illegible] is not for us to sit in judgment on attempts by the states to evolv[illegible] fair tax policies. When a tax appropriately challenged before u[illegible] is not found to be in plain violation of the Constitution our tas[illegible] is ended.

Chapter 236 of the New Jersey Laws of 1918, as applied to th[illegible] circumstances of these two cases, clearly does not offend the Con[illegible] stitution. In substance, such legislation has heretofore been found free from constitutional infirmity. *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, affirming 41 N. Dak. 330. During all the vicissitudes which the so-called "jurisdiction-to-tax" doctrine has encountered since that case was decided, the extent of a state's taxing power over a corporation of its own creation, recognized in the *Cream of Wheat* case, has neither been restricted nor impaired. That case has not been cited otherwise than with approval.[2] Questions affecting the fictional "situs" of intangibles, which received full consideration in *Curry* v. *McCanless*, decided this day, do not concern the present controversies. *Cream of Wheat Co.* v. *Grand Forks*, *supra*, and the cases that have followed it, afford a wholly adequate basis for affirming the judgments below.

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[2] See Citizens National Bank v. Durr, 257 U. S. 99, 109; Schwab v. Richardson, 263 U. S. 88, 92; Baker v. Druesedow, 263 U. S. 137, 141; Swiss Oil Corp. v. Shanks, 273 U. S. 407, 413; Hellmich v. Hellman, 276 U. S. 233, 238; Montgomery Ward & Co. v. Emmerson, 277 U. S. 573; Educational Films Corp. v. Ward, 282 U. S. 379, 391; Nebraska ex rel. Beatrice Creamery Co. v. Marsh, 282 U. S. 799, 800; First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 237.

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